

Endicott Forging & Manufacturing, Inc. and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local Union No. 1101, AFL-CIO.¹ Case 3-CA-21062

September 30, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

Upon a charge filed on January 14, 1998,² the Acting General Counsel of the National Labor Relations Board issued a complaint on April 21, against Endicott Forging & Manufacturing, Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. By letters dated May 4 and 26, the Respondent filed an answer admitting the complaint allegations and asserting an affirmative defense.

On August 31, the Acting General Counsel filed a “Motion to Transfer Proceedings to Board and for Summary Judgment and Issuance of Board’s Decision and Order.” On September 3, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The complaint alleges, inter alia, that since on or about August 31, 1997, the Respondent has failed to continue in effect all the terms and conditions of its 1997–1998 collective-bargaining agreement with International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local Union No. 1101, AFL-CIO, by failing to abide by Section 24 (Union Pension Fund). The complaint alleges that the Respondent engaged in such conduct without the Union’s consent. The complaint further alleges that by such conduct the Respondent has failed and refused to bargain collectively with the Union, its employees’ exclusive collective-bargaining representative, in violation of Section 8(a)(1) and (5) of the Act.

Although in its May 26 response to the complaint the Respondent “admit[ted] to the allegations presented in Case 3-CA-21062,” it attempted in its May 4 response to explain why it failed to meet its contractual obligations to the employees represented by the Union. The Respondent asserted that “[t]he reason for our not making the necessary pension plan contributions resulted from the financial condition of our company.” The Respondent’s defense is one of economic necessity. It is well established, however, that Section 8(a)(5) and (1) of

the Act prohibits an employer that is a party to an existing collective-bargaining agreement from modifying the terms and conditions of employment of that agreement without obtaining the consent of the Union. See *Endicott Forging & Mfg.*, 319 NLRB 1 (1995), and *Endicott Forging & Mfg.*, 319 NLRB 180 (1995)³ (both cases citing *Kane Systems Corp.*, 315 NLRB 355 (1994); *Nick Robilotto, Inc.*, 292 NLRB 1279 (1989)).

Thus, the Respondent has admitted all the facts material to a resolution of the unfair labor practice issues raised by the complaint. An employer’s claim that it is financially unable to pay for contractually required benefits, “even if proven, does not constitute an adequate defense to an allegation that an employer has unlawfully failed to abide by provisions of a collective-bargaining agreement.” *Zimmerman Painting & Decorating*, 302 NLRB 856, 857 (1991). Therefore, the Respondent’s answer to these complaint allegations has raised no issues warranting a hearing.

In the absence of any material issues warranting a hearing, we grant the General Counsel’s Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a New York corporation, with its principal office and place of business located in Endicott, New York, is engaged in the manufacture and sale of metal forging. During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its business operations, purchased and received goods and materials valued in excess of \$50,000, which were shipped to its Endicott facility directly from points located outside the State of New York. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All employees in production and maintenance (but excluding the die department, office, clerical employees, and all supervisors, foremen and assistant foremen in

¹ The case caption is amended to reflect the name of the Charging Party listed on the charge.

² All dates are in 1998 unless otherwise indicated.

³ In the latter case, the Board found that the Respondent violated Sec. 8(a)(1) and (5) of the Act by, inter alia, failing to provide the contractually required medical and dental insurance coverage to the bargaining unit employees represented by the Union. On April 18, 1996, the United States Court of Appeals for the Second Circuit enforced the Board’s decision. Four months later, the Board found that the Respondent further violated Sec. 8(a)(1) and (5) by failing to make contractually required Sec. 401(k) pension contributions and bonus payments. See *Endicott Forging & Mfg.*, 322 NLRB No. 4 (1996) (not reported in Board volumes).

charge of any classes of employees) for whom the union, is or may be, during the term of this agreement, certified by the National Labor Relations Board as the exclusive collective bargaining representative as determined by the election conducted by the National Labor Relations Board of November 29, 1944.

Since about 1944, and at all times thereafter, the Union has been the designated exclusive collective-bargaining representative of the unit and since then the Union has been recognized as the representative by the Respondent. This recognition has been embodied in a series of collective-bargaining agreements, the most recent of which had a term of May 16, 1997, to May 16, 1998. At all times since 1944, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit employees.

Since on or about August 31, 1997, the Respondent has failed to continue in effect all the terms and conditions of the 1997-1998 collective-bargaining agreement by failing to abide by Section 24 (Union Pension Fund). The Respondent engaged in this conduct without the Union's consent. The terms and conditions of employment described above are mandatory subjects for purposes of collective bargaining. By this conduct described above, the Respondent has failed and refused to bargain collectively with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

CONCLUSION OF LAW

By failing since on or about August 31, 1997, to abide by Section 24 (Union Pension Fund) of the 1997-1998 collective-bargaining agreement, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by failing to make contractually required contributions to the Union Pension Fund, we shall order the Respondent to make whole its unit employees by making all such delinquent contributions, including any amounts due the fund in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir.

1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁴

ORDER

The National Labor Relations Board orders that the Respondent, Endicott Forging & Manufacturing, Inc., Endicott, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Union as the exclusive collective-bargaining representative of the unit employees by failing and refusing to make contractually required contributions to the Union Pension Fund.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Pay all delinquent Union Pension Fund contributions, including any additional amounts due the fund, and reimburse the unit employees for any expenses ensuing from the Respondent's failure to make the required payments since on or about August 31, 1997, in the manner set forth in the remedy section of this Decision.

(b) On request, bargain with International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local Union No. 1101, AFL-CIO as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All employees in production and maintenance (but excluding the die department, office, clerical employees, and all supervisors, foremen and assistant foremen in charge of any classes of employees) for whom the union, is or may be, during the term of this agreement, certified by the National Labor Relations Board as the exclusive collective bargaining representative as determined by the election conducted by the National Labor Relations Board of November 29, 1944.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back-pay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Endicott, New York office, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on

⁴ To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the Employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employees, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judge's

forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained by it for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in this proceeding, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 31, 1997.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with the Union as the exclusive collective-bargaining representative of our unit employees by failing and refusing to make contractually required contributions to the Union Pension Fund.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL pay the delinquent Union Pension Fund contributions, including any additional amounts due the fund, and WE WILL reimburse the unit employees for any expenses ensuing from our failure to make the required payments, with interest.

WE WILL, on request, bargain with International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local Union No. 1101, AFL-CIO as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All employees in production and maintenance (but excluding the die department, office, clerical employees, and all supervisors, foremen and assistant foremen in charge of any classes of employees) for whom the union, is or may be, during the term of this agreement, certified by the National Labor Relations Board as the exclusive collective bargaining representative as determined by the election conducted by the National Labor Relations Board of November 29, 1944.

ENDICOTT FORGING & MANUFACTURING, INC.